

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.RAMACHANDRAN

&

THE HONOURABLE MR. JUSTICE A.K.BASHEER

THURSDAY, THE 7TH DECEMBER 2006 / 16TH AGRAHAYANA 1928

RFA.No. 74 of 2005()

OS.145/2001 of ADDL.SUB COURT, KOCHI
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: APPELLANTS

1. STELLA PAUL, W/O.LATE K.F.PAUL ANTONY,
AGED 60 YEARS, KURISINGAL HOUSE,
PALLURUTHY, KOCHI-6.
2. MATHIAS FRANCIS,
S/O.PAUL ANTONY, AGED 37 YEARS,
KURISINGAL HOUSE, PALLURUTHY, KOCHI-6.
3. PAUL JOSEPH,
S/O.PAUL ANTONY, AGED 35 YEARS,
KURISINGAL HOUSE, PALLURUTHY, KOCHI-6.
4. HONEY JOSE, W/O.JOSE M.LUIS,
AGED 33 YEARS, MANDAPATHIL HOUSE,
MUDIKAIRAI P.O.
5. CHARLS JULAIN,
S/O.PAUL ANTONY, AGED 28 YEARS,
KURISINGAL HOUSE, PALLURUTHY, KOCHI-6

BY ADV. SRI.B.N.SHIVSANKAR

RESPONDENTS:

1. K.F.PETER, S/O.K.P.FRANCIS,
AGED 57 YEARS, KURISINGAL HOUSE,
D.NO.23/2000 A, PALLURUTHY, KOCHI-6.
2. K.F.JOSEPH,
KURISINGAL HOUSE, D.NO.23/2177,
PALLURUTHY, KOCHI-6.

BY ADV. SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.
SRI.JOSEPH EDAKKATT
SMT.MINI.V.A.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION
ON 07/12/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

M. RAMACHANDRAN & A.K. BASHEER, JJ.

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R.F.A.NO.74 OF 2005

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DATED THIS THE 7TH DAY OF DECEMBER, 2006.

JUDGMENT

Ramachandran, J.

This appeal had been filed after considerable delay. But after hearing the respondents, being a suit for partition, the delay had been condoned. We have heard the respondents as well.

2. The appellants are the legal heirs of the first defendant who is no more. The suit had been filed for partition. A preliminary decree had been passed on 15.11.2002. However, quite some time thereafter, the defendants had come across, according to them, a will the presence of which would have altered the situation to their advantage. The preliminary decree as on today if permitted to remain, might go against the recitals of the registered will, it is submitted and the matter has to be subjected to a fresh consideration by the court below.

3. On behalf of the respondents, however, an objection had been raised that against the preliminary decree, I.A.No.504/2003 had been filed on 24.3.2003, but it was rejected because of non-prosecution. However, since the preliminary decree is subjected to challenge, we do not think taking notice of the totality of circumstances, this should bind our hands for considering the matter on merit.

4. We also note that the respondents do not seriously challenge the averments in the appeal memorandum but of course reserve their right to challenge

the genuineness of the will. We feel that when a registered will is there, the properties of the deceased have to be partitioned taking notice of the presence of such will. We also find justification in the submission of the respondents that the court will have the duty to pronounce upon the genuineness of the will.

5. In the aforesaid circumstances, the preliminary decree is set aside and the matter is remitted back to the Additional Sub Court, Kochi. The appellants herein would have the liberty to bring the notice of the court below the registered will referred to in the appeal memorandum and parties can also make appropriate amendments to the pleadings as might be necessary. However, we also notice that the matter has remained in the court for quite a long period. Therefore, in the interest of justice, it should be ensured that further proceedings after remand are appropriately expedited and if possible, preliminary decree has to be passed within six months from today. The parties assure of co-operation.

The appeal is disposed of in the above terms. The parties shall appear before the court below on 5.1.2007.

(M.Ramachandran, Judge.)

(A.K. Basheer, Judge.)

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